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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 74-654

STATE OF TENNESSEE, EX REL,
OTIS O'DELL, ET AL, - - - - - - - - - *Petitioners*,

v.

CITY OF CHATTANOOGA,
ROBERT KIRK WALKER, ET AL, - - - - *Respondents*.

STATE OF TENNESSEE, EX REL,
ROBERT J. HICKS, ET AL, - - - - - - - *Petitioners*,

v.

CITY OF CHATTANOOGA,
ROBERT KIRK WALKER, ET AL, - - - - *Respondents*.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

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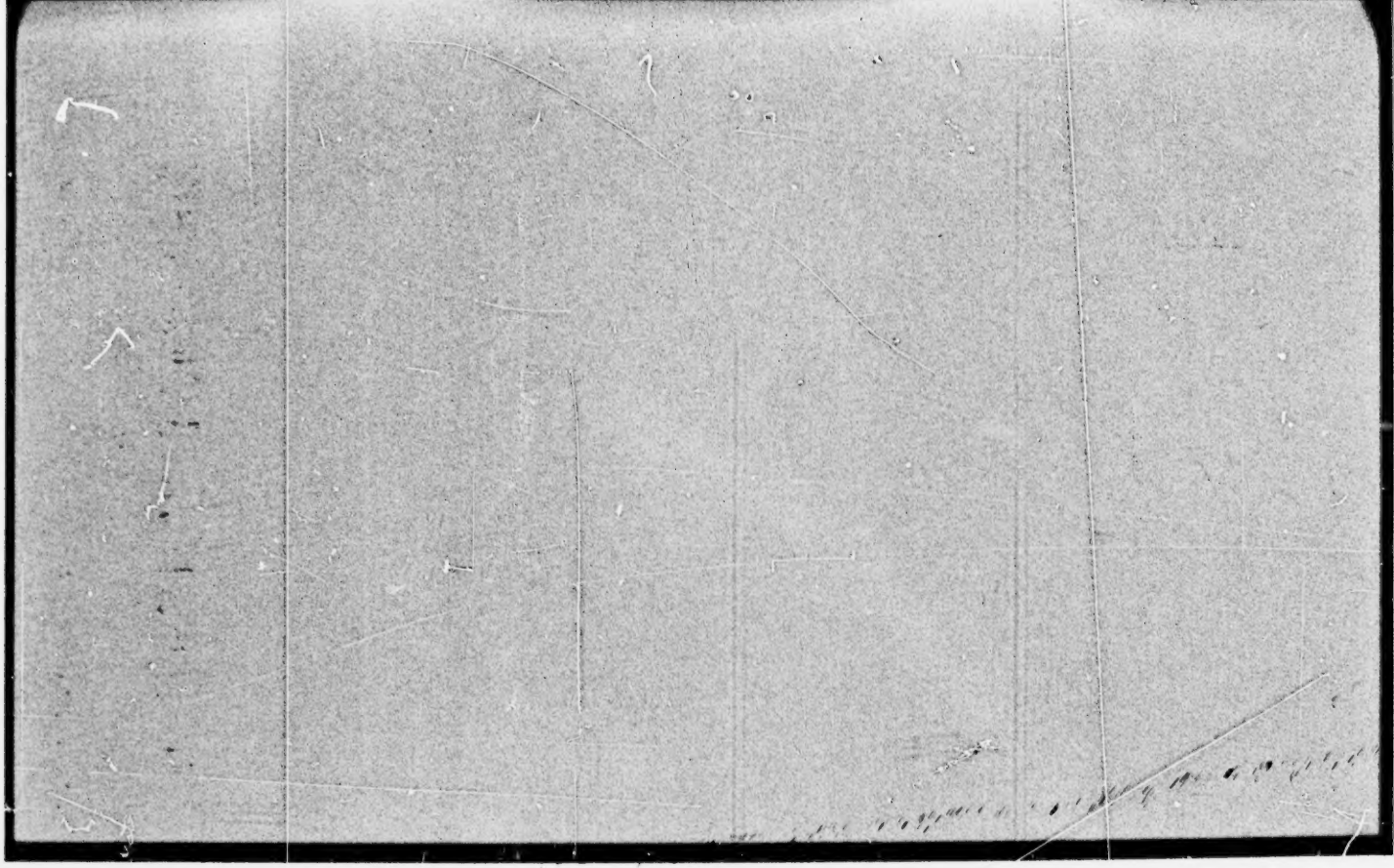

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Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners in these two cases, which involve closely related questions, pray that a Writ of Certiorari

issue to review the opinion of the Supreme Court of the State of Tennessee as rendered in the above-styled cases on July 29, 1974.

OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINION OF THE COURTS BELOW

These cases originated in the Circuit Court of Hamilton County, Tennessee. The Honorable Sam E. Boaz, Judge of Law and Equity in Clarksville, Tennessee, was appointed by the Chief Justice of the Supreme Court of Tennessee to hear these cases. On July 3, 1973, Judge Boaz rendered a decision in favor of the petitioners against the respondents. A copy of his memorandum opinion appears as Appendix A. On July 21, 1973, Judge Boaz issued an amendment to his memorandum opinion, a copy of which appears as Appendix B. The respondents appealed to the Tennessee Supreme Court sitting at Knoxville, Tennessee. The Supreme Court reversed Judge Boaz and its opinion appears as Appendix D.

Thereafter, petitioners filed a petition to rehear and a copy of the opinion of the Supreme Court of Tennessee denying same filed on August 30, 1974, appears as Appendix E. Petitioners made application for special leave to file a second petition for rehearing, which was denied by the Supreme Court of Tennessee on September 23, 1974, and a copy of the order denying the application appears as Appendix F.

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Supreme Court of Tennessee which reversed the decision of the Trial Judge in these cases was filed on July 29, 1974.

The opinion of the Supreme Court of Tennessee denying petitioners' petition to rehear was filed on August 30, 1974, and the order denying petitioners' application for special leave to file a second petition for rehearing was filed on September 23, 1974.

This petition for writ of certiorari is filed under 28 USCA 1257 (3) and was filed within 90 days of August 30, 1974, the date of the opinion of the Supreme Court of Tennessee denying petitioners' petition to rehear.

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER PETITIONERS WERE DEPRIVED OF THEIR RIGHTS TO DUE PROCESS OF LAW AND THE EQUAL PROTECTION OF THE LAWS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY THE SUPREME COURT OF TENNESSEE IN ITS ADOPTION OF A "FAIRLY DEBATABLE" TEST WHEN AS APPLIED BY THE SAID COURT DIMINISHES THE ROLE INTENDED BY THE TENNESSEE LEGISLATURE OF A TRIAL JUDGE IN AN ANNEXATION PROCEEDING AND IN EFFECT NULLIFIES THE LEGISLATIVE RIGHT OF PETITIONERS TO CONTEST THE VALIDITY OF AN ANNEXATION ORDINANCE.

II. WHETHER TCA 6-309, ANNEXATION BY ORDINANCE, VIOLATES THE ONE-MAN, ONE-VOTE PRINCIPLE AND IS THEREFORE UNCONSTITUTIONAL IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

III. WHETHER THE PETITIONERS' RIGHTS TO DUE PROCESS OF LAW UNDER THE FOURTEENTH

AMENDMENT TO THE UNITED STATES CONSTITUTION AND THEIR RIGHTS UNDER THE FIFTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WERE VIOLATED WHEN THEY WERE DENIED THE RIGHT TO OFFER EVIDENCE OF A PRECONCEIVED AND UNCONSTITUTIONAL PLAN TO DILUTE THE VOICE AND INFLUENCE OF THE BLACK CITIZENS WITHIN THE CITY OF CHATTANOOGA.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment 14, U. S. Constitution, Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Amendment 15, U. S. Constitution, Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.

STATUTES INVOLVED

Tennessee Code Annotated 6-309. Annexation by ordinance. Text appearing as Appendix G.

Tennessee Code Annotated 6-310. Quo Warranto to Contest Annexation Ordinance. Text appearing as Appendix H.

STATEMENT OF THE CASES

On February 2, 1972, the respondents passed on third and final reading numerous ordinances seeking to annex territories to the City of Chattanooga, which would almost double the number of square miles within its municipal boundaries and increase its population by approximately 32,000 people. Separate areas were annexed by separate ordinances. For clarification, the petitioners in the case of *State, Ex Rel, Otis O'Dell, et al, v. City of Chattanooga, et al,* are residents and property owners of Area 4, known as Tiftonia, and the petitioners in the case of *State, Ex Rel, Robert J. Hicks, et al, v. City of Chattanooga, et al,* are residents and property owners of Area 12, known as Wauhatchie. On February 12, 1972, residents who lived in Area 4 and Area 12 filed suits in the nature of quo warranto proceedings to contest the validity of the annexation of their respective areas on the grounds set forth in Tennessee Code Annotated, Section 6-310, that it reasonably may not be deemed necessary for the welfare of the residents and property owners of Areas 4 and 12 and the municipality as a whole and so constitutes an exercise of power by the respondents not conferred by law. The petitioners in both cases raised in their complaints that the annexation of Areas 4 and 12 was preconceived to dilute the voice and influence of the black citizens and property owners within the present boundaries of the City of Chattanooga by extending its boundaries to include areas marked by an absence of black residents, and that as such said ordinances discriminate against the black citizenry of the City of Chattanooga and constitute a violation of the 14th Amendment of the United States Constitution; further, petitioners in both cases alleged in their complaints that the illegal exercise of power by the respondents constituted a violation of the due process and equal protection clause

of the 14th Amendment of the United States Constitution. In addition to these suits, two other similar actions were filed by the residents of Areas 13A, known as North Mountain Creek, and 9B, known as East Brainerd. By consent of the parties, all the cases were consolidated for trial. The cases came on to be heard together on March 19 through March 29, 1973, before the Honorable Sam E. Boaz.

After hearing all the proof, *a personal tour of the areas by the Court* and the entire record as a whole, Judge Boaz found that it was an unreasonable exercise of the legislative function delegated to the City of Chattanooga by the Legislature of the State of Tennessee to allow the annexation of Areas 4 and 12. Judge Boaz stated in his memorandum opinion which appears in the Appendix, Page 28.

> "It appears to the Court that TCA Section 6-309 provides a guideline to the legislative body of the municipality by providing that it determine that the prosperity of the municipality and proposed annexed area will be materially retarded and the safety and welfare of the inhabitants and property thereof endangered unless annexation takes place and if the procedure therein outlined is followed then under section 6-310 if the annexation is contested it becomes a judicial function to determine whether the annexation is reasonably necessary for the welfare of the residents and property owners of the affected territory and the municipality as a whole giving consideration to the health, safety and welfare of the citizens and property owners of both the territory sought to be annexed and the citizens and property owners of the municipality.

Judge Boaz further stated in his memorandum opinion appearing on Page 29 of the Appendix:

". . . that it would be an unreasonable exercise of the legislative function delegated to the City of Chattanooga by the Legislature of the State of Tennessee to allow the annexation of Tiftonia and Wauhatchie in view of the proof mentioned above, that is that the natural growth of the city is to the north and east. Tiftonia and Wauhatchie are separated from the City of Chattanooga by the Tennessee River and by Lookout Mountain and are natural communities within themselves and are somewhat isolated from the city. There was virtually no proof of any relationship between the natural growth of the City of Chattanooga and the land area to the west of the city and, consequently, no proof that it would be necessary to plan the development of these areas for the future orderly development of the city. There was proof that the construction of I-24 had made these areas more easily accessible to the City of Chattanooga, but there was also proof that one of the principal arteries for transportation from this area was along the Cummings Highway, which passes through a county area before getting into the areas known as Tiftonia and Wauhatchie. The welfare of the residents and property owners of Tiftonia and Wauhatchie as well as the City of Chattanooga would not in the Court's opinion be adversely affected if the annexation of the two areas was not consummated. In view of the above findings and after giving due consideration to the topography and geographic features of the two areas as related to the city, the annexation of Tiftonia and Wauhatchie cannot reasonably be justified at this time, and it is the court's opinion that annexation would be unreasonable under the circumstances."

On August 14, 1973, a final decree was entered declaring Ordinance No. 6397, which annexed Area 4, and 6393,

which annexed Area 12, unreasonable and vacating same. Regarding the other two cases filed by residents and property owners of 13A and 9B, Judge Boaz found for the respondents and upheld the validity of the annexation ordinances. With respect to the decisions in the present cases involving Areas 4 and 12, respondents filed a motion for a new trial or reconsideration, which was overruled in both cases by Judge Boaz on December 5, 1973. Respondents thereafter appealed to the Supreme Court of Tennessee and by its opinion the Supreme Court reversed the decision of the trial judge with respect to Areas 4 and 12. The Supreme Court found that Trial Judge Boaz did not apply the proper rule of law in passing upon the facts as he found them to be from all of the evidence. Thereafter, a petition to rehear, brief and argument in support thereof and supplement thereto was filed by petitioners emphasizing the importance of the role of the trial judge in an annexation proceeding and raising the question that TCA 6-309 is a blatant violation of the one-man, one-vote principle and unconstitutional in violation of the due process and equal protection clauses of the Federal Constitution. The petition to rehear was denied on July 29, 1974, by the Supreme Court of Tennessee. Thereafter, an application for special leave to file a second petition for rehearing was filed by petitioners seeking to raise new questions relating to the importance of the role of the Trial Judge in an annexation proceeding and new issues regarding the constitutionality of the annexation statutes and ordinances passed thereunder and the action of the Supreme Court in reversing the decision of the Trial Judge. This application was denied by the Supreme Court of Tennessee in an order filed on September 23, 1974. In this order, the Supreme Court erroneously stated that all questions as to the constitutionality of the statute and of the applicable rule in passing upon the evidence were considered in the

original opinion and the petition to rehear. Further in this order, Special Justice W. M. Leech stated that the motion was not filed prior to the adjournment of court and comes too late. It's interesting to note that the opinion on the petition to rehear was not filed until August 30, 1974, and was not received by petitioners' attorney until after the adjournment of the Tennessee Supreme Court, which left no time in which to make application for special leave to file a second petition for rehearing and which marked the retirement of four of the five justices of the Court.

ARGUMENT

I

WHETHER PETITIONERS WERE DEPRIVED OF THEIR RIGHTS TO DUE PROCESS OF LAW AND THE EQUAL PROTECTION OF THE LAWS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY THE SUPREME COURT OF TENNESSEE IN ITS ADOPTION OF A "FAIRLY DEBATABLE" TEST WHEN AS APPLIED BY THE SAID COURT DIMINISHES THE ROLE INTENDED BY THE TENNESSEE LEGISLATURE OF A TRIAL JUDGE IN AN ANNEXATION PROCEEDING AND IN EFFECT NULLIFIES THE LEGISLATIVE RIGHT OF PETITIONERS TO CONTEST THE VALIDITY OF AN ANNEXATION ORDINANCE.

The decision below deserves the attention of this court because due process of law protects against arbitrary action, consequently, arbitrary action by the tribunal in the hearing of a cause or in its order violates due process. *Washington, ex rel, Oregon R. & Nav. Co. v. Fairchild*, 224 U.S. 510. While the contraction of the boundaries of a municipality is essentially a legislative function, it is

subject to judicial review on the question whether there is any reasonable basis for the contraction and whether the evidence reflects public convenience and necessity. *Marshall v. Mayor & Board of Selectmen*, 382 U.S. 836. The Supreme Court has never acknowledged that the states have power to do as they will with municipal corporations regardless of consequences. Legislative control of municipalities no less than other state power lies within the scope or relevant limitations imposed by the United States Constitution. *Gomillion v. Lightfoot*, 364 U.S. 339. When this Court reviews state court judgments involving constitutional issues, it "must review independently both the legal issues and those factual matters with which they are commingled." *United States v. John J. Felin & Co., Inc.*, 334 U.S. 640.

Prior to the adoption of the relevant annexation statutes in 1955, no provision existed for Tennessee municipalities to annex adjoining territory by ordinance. Before 1955, boundaries of municipalities could be extended by the Tennessee Legislature or by a vote of approval by a majority of the people in an area proposed to be annexed (referendum). In 1961, the Tennessee Legislature amended TCA 6-309 to restrict Tennessee municipalities in the exercise of their power to annex by ordinance by requiring that before any territory more than one-fourth (1/4) square mile in area or having a population of more than five hundred (500) persons may be annexed under 6-309, the governing body of the municipality shall adopt a plan of services setting forth at a minimum the identification and projected timing of municipal services proposed to be extended into the territory proposed to be annexed. In the present cases, a plan of services was adopted under a portion of TCA 6-309, known as the variable tax act, which was declared unconstitutional by the Tennessee Supreme Court in another

case after the filing of these lawsuits. The respondents have never adopted another plan of services to conform with the remaining requirements of TCA 6-309 and petitioners contend that another reason for the invalidity of the annexation ordinances is that respondents have not complied with TCA 6-309 regarding a plan of services.

When the Tennessee Legislature extended the right to municipalities to annex by ordinance, it placed limitations upon them and provided in TCA 6-310 that any aggrieved property owner within the territory subject to annexation may file a suit in the nature of a quo warranto proceeding to contest the validity of the annexation on the ground that it reasonably may not be deemed necessary for the welfare of the residents and property owners of the effected territory and the municipality as a whole so constituting an exercise of power not conferred by law. The Legislature further stated that the question before the court shall be whether the proposed annexation be or be not unreasonable in consideration of the health, safety and welfare of the citizens and property owners of the territory sought to be annexed and the citizens and property owners of the municipality. The Legislature then directed that should the court find the ordinance to be unreasonable an order shall be issued vacating the same.

The interpretation by Judge Boaz of the relevant Tennessee Code sections was correct and based precisely upon the only reasonable conclusion that could be drawn from the language appearing in such sections.

Respondents emphasized and the Tennessee Supreme Court agreed that Judge Boaz erred by substituting his opinion for that of the respondents. This is the crux of this first question presented for review. As shown, the Tennessee Legislature charged the Trial Judge in an an-

nexation proceeding with certain duties. By judicial decision and not by legislative enactment, the State of Tennessee through its Supreme Court has adopted a rule that if a "fairly debatable" question arises as to the reasonableness of an annexation ordinance that the trial judge must hold for the municipality. In the present cases, petitioners presented the most comprehensive evidence ever offered in a Tennessee annexation case against the reasonableness of the annexation ordinances.

Petitioners did not attack the concept of annexation, but proved by overwhelming evidence that the annexation of Areas 4 and 12 by the City of Chattanooga was unreasonable. After a personal tour of the areas after the completion of all the proof, Judge Boaz found the annexation of Areas 4 and 12 to be unreasonable and in accordance with TCA 6-310 vacated them. Judge Boaz performed his judicial function precisely as required under TCA 6-310 and the test adopted and unrealistically applied by the Supreme Court of Tennessee not to be found anywhere within the Tennessee annexation statutes diminishes the role of the trial judge in an annexation proceeding and effectively nullifies the right of petitioners to contest the validity of an annexation ordinance and denies them due process of law and equal protection of the laws.

This "fairly debatable" test was adopted by the Tennessee Supreme Court from the Missouri case of *City of St. Joseph v. Hankinson*, 312 S.W.2d 4. It is interesting to note, however, that in Missouri the city has the burden of proving that its resolution of annexation is reasonable and necessary to the proper development of the city. *City of Lawson v. Cates*, (App. 1972) 485 S.W.2d 146. Unlike Tennessee, in Missouri the burden of establishing the prerequisite elements of (1) the area to be annexed, (2) that such annexation is reasonable and neces-

sary to the proper development of said city, and (3) the ability of said city to furnish normal municipal services of said city to said unincorporated area within a reasonable time after said annexation is to become effective, which elements appear in 71.015 of the Missouri Code, rests on the city which seeks to annex unincorporated land. *City of Mexico v. Hodges*, (App. 1972) 482 S.W.2d 545.

A court in reaching its ultimate decision as to the reasonableness of a municipality's legislative decision with respect to a proposed annexation must consider the comparative benefits and detriments to both the annexing municipality and the area to be annexed. *Creve Coeur v. Brame*, (Mo. App.) 446 S.W.2d 173. This language squares with the role of the trial judge in an annexation proceeding as intended by the Tennessee Legislature in TCA 6-310.

Trial Judge Boaz made a personal inspection of the territories in question. The decision of a trial judge in an annexation proceeding is entitled to weight, but where he examines the locus in quo, his findings and decree are entitled to more consideration. *Portland General Electric Co. v. City of Estacada*, 194 Or. 145, 241 P.2d 1129.

Even in Tennessee the Supreme Court in *State of Tenn., ex rel, Balsinger v. Town of Madisonville*, 222 Tenn. 272, 435 S.W.2d 803, has stated that there is a statutory presumption in favor of the judgment of the trial court unless the preponderance of the evidence is otherwise, however, because of the adoption of the "fairly debatable" test and its arbitrary and unreasonable application by the Tennessee Supreme Court, the preponderance rule was ignored in the present case.

Under most statutes, the courts generally hold that the question of the reasonableness of extension of corporate limits is subject to judicial review, and if found unreasonable will be declared void. *Portland v. City of Estacada*, *supra*.

As relates to the exercise of powers, it is generally regarded that municipal corporations have none of the elements of sovereignty; that they cannot go beyond the powers granted them, and that they must exercise such granted powers in a reasonable manner. These are legal propositions well settled and are everywhere enforced by judicial judgments. *Portland v. City of Estacada*, *supra*.

In quo warranto proceedings, the relative province of court and jury is the same as in other cases and conformable to the general practice. 65 Am. Jur. 2d 308.

The record contains overwhelming proof that Area 4 is classified as a low density area and Area 12 is hardly classified even as low density, that their terrains consist of bottom land lying within flood plains, a large island known as Williams Island with no means of ingress or egress, and a great majority of land consisting of steep slopes, none of which can be developed. The few houses located in Area 12 are typical rural farm houses and what open or flat land or developmental land there might be in Area 12 represents generally acreage and farms. (BE 697, 1-7) (BE 697, 11 - BE 701, 9). In the Tiftonia-Wauhatchie area there are two major limiting geographical influences on development, being the mountains—Lookout Mountain, Elder Mountain, and Raccoon Mountain—and the Tennessee River. As a result of geography, these areas are relatively isolated from the urban area. (BE 702, 10 - BE 740, 20). Although Area 4 includes more houses than Area 12, it is a low density area, the

major part of which is also rural and agricultural. Both areas have demonstrated almost no potential for growth due to the limiting geographical features. The natural and overwhelming growth of the City of Chattanooga is in the opposite direction to that of Areas 4 and 12. (See Trial Judge's Memorandum Opinion, Appendix A hereto.)

A state statute annexing large areas of land not occupied or improved and having no reasonable relation to the respective growth of the City or to its needs or convenience was invalid. *State, ex rel, Attorney General v. Avon Park*, 108 Fla. 641, 149 So. 409; *State, ex rel, Davis v. Largo*, 110 Fla. 21, 149 So. 420.

City limits should not be so extended as to take in contiguous land (1) when they are used only for purposes of agriculture or horticulture and are valuable on account of such use; (2) when they are vacant and do not derive special value from their adaptability for city uses. *Portland v. City of Estacada, supra.*

II

WHETHER TCA 6-309, ANNEXATION BY ORDINANCE, VIOLATES THE ONE-MAN, ONE-VOTE PRINCIPLE AND IS THEREFORE UNCONSTITUTIONAL IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The decision below deserves the attention of this Court because petitioners are protected by the Fourteenth Amendment of the Federal Constitution from inequality of representation. *Baker v. Carr*, 369 U.S. 186. To the extent that TCA 6-309 permits municipal officials to enact ordinances that directly affect a large segment of citizens who have had no right to participate in their election, it blatantly violates the one-man, one-vote principle.

In *Gray v. Sanders*, 372 U.S. 368, the Court stated that once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and *wherever their home may be in that geographical unit*. This is required by the equal protection clause of the Fourteenth Amendment. (Emphasis supplied.) The petitioners of Areas 4 and 12 did not even have one vote much less an equal vote in the election of the municipal officials of the City of Chattanooga, but are the ones most effected by their action. Petitioners of Areas 4 and 12 are being governed by elected officials whose election they have not participated in, which clearly demonstrates an unjustifiable inequality of representation as compared to those citizens who so participated who comprise a much larger group. Legislative control of municipalities no less than other state power lies within the scope of relevant limitations imposed by the United States Constitution. The opposite would sanction the achievement by a state of any impairment of voting rights whatever so long as it was cloaked in the garb of the realignment of political subdivisions. It is inconceivable that guaranties imbedded in the Constitution of the United States may thus be manipulated out of existence. *Baker v. Carr, supra.*

III

WHETHER THE PETITIONERS' RIGHTS TO DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND THEIR RIGHTS UNDER THE FIFTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WERE VIOLATED WHEN THEY WERE DENIED THE RIGHT TO OFFER EVIDENCE OF A PRECONCEIVED AND UNCONSTITUTIONAL PLAN TO DILUTE THE VOICE AND INFLUENCE OF THE BLACK CITIZENS WITHIN THE CITY OF CHATTANOOGA.

The decision below deserves the attention of this Court because originally both of these cases included two black petitioners who resided within the existing municipal boundaries of the City of Chattanooga. The complaints of both cases alleged that the annexation of Areas 4 and 12 was preconceived to dilute the voice and influence of the black citizens and property owners within the present boundaries of the respondent by extending its boundaries to include areas marked by an absence of black residents and that as such said ordinances discriminate against the black citizenry of the City of Chattanooga and constitutes a violation of the Fourteenth Amendment of the United States Constitution. As stated, these cases are suits in the nature of quo warranto proceedings and the quo warranto statute of Tennessee, TCA 23-2801, is therefore applicable and provides:

> Grounds for Action. An action lies in the name of the state against the person or corporation offending in the following cases:
>
> (5) or exercise powers not conferred by law.

Trial Judge Boaz held that the two black petitioners were improper parties because they were not aggrieved owners

of property lying within the territory proposed to be annexed. Said black petitioners and the remaining petitioners were, therefore, denied due process of law by being prevented from offering evidence to prove a preconceived and unconstitutional plan to dilute the voice and influence of the black citizens within the existing municipal boundaries of the City of Chattanooga.

Prior to the annexation of some 32,000 people at one time, black citizens comprised almost 50 percent of the total population of the City of Chattanooga. Areas 4 and 12 have no black residents.

A statute which is alleged to have worked unconstitutional deprivations of petitioners' rights is not immune to attack simply because the mechanism employed by the Legislature is a redefinition of municipal boundaries. *Gomillion v. Lightfoot, supra.* The Fifteenth Amendment nullifies sophisticated as well as simple-minded modes of discrimination. *Lane v. Wilson,* 309 U.S. 268; *Gomillion v. Lightfoot, supra.*

CONCLUSION

Petitioners spent many hours in preparing their cases and their proof was directly related to the question of whether the proposed annexations be or be not unreasonable in consideration of the health, safety and welfare of the citizens and property owners of the territories sought to be annexed and the citizens and property owners of the municipality. A professional urban planner and a traffic engineer with a Master's Degree in Transportation Planning testified as expert witnesses for the petitioners. For the first time in a Tennessee annexation case, the petitioners through the testimony of the urban planner provided a realistic definition of the terms: health,

safety and welfare. An exhaustive cost revenue analysis of Areas 4 and 12, as well as of the City of Chattanooga, was offered through the testimony of the Transportation Planning expert. Both expert witnesses concluded that the annexation of Areas 4 and 12 was clearly unreasonable based upon the city's past performance, its demonstrated capabilities and the needs and characteristics of Areas 4 and 12, as well as of the City of Chattanooga. Respondents offered no proof to contradict the testimonies of these two expert witnesses by any member of the staff of its municipal engineering consultant. Petitioners did not conduct an attack upon the principle of annexation, but proved by overwhelming evidence that the annexation of Areas 4 and 12 was arbitrary and unreasonable. It has been noted that four separate cases were consolidated for trial purposes and that the trial judge after personally touring the areas concluded against the respondents in the cases involving Areas 4 and 12, and in favor of the respondents in the cases involving the other two areas. In his memorandum opinion, Judge Boaz summarized the general evidence offered by respondents that municipal services could be provided to all of the four areas. The Supreme Court of Tennessee referred to this summary to support its decision to reverse the lower trial court because of the "fairly debatable" test. Petitioners proved, however, that Areas 4 and 12 already had sufficient services which were comparable or better than those services offered by respondents; and that within the definition of health, safety and welfare, petitioners occupied a better position than did residents of the City of Chattanooga. Petitioners further proved that the major portions of their respective areas were undevelopable due to the vast lands lying within flood plains, steep terrain, a 400-acre island with no means of ingress and egress and imperfect soil characteristics prohibiting the installation of a sewer

system, increased traffic facilities and residential or industrial development. Although no demand for a need of the installation of a sewer system was indicated, it was shown that Areas 4 and 12 were considered as low priority areas even by the City of Chattanooga on their time table for receiving sewers. In fact, it was shown that it was not at all feasible in Area 12 to install a sewer system because the homes therein being farm houses widely separated from each other. It was further shown that the only feasible way to provide sewer services to Areas 4 and 12 was by the installation of sewer lines under the Tennessee River (which might never be accomplished because of problems related to environmental regulations). The proof offered by respondents did not contradict the specific proof of petitioners relating to Areas 4 and 12. Petitioners insist that because they specifically complied with TCA 6-310 and overwhelmingly proved the unreasonableness of the annexation of their areas, and the finding of the trial judge that such annexation was, in fact, unreasonable, and in view of the proof offered by respondents consisting of only theoretical statements in support of annexation in general, but not specifically relevant to Areas 4 and 12 and the resulting arbitrary action by the Supreme Court of Tennessee in reversing the lower court's decision respecting Areas 4 and 12 based upon the "fairly debatable" rule, petitioners were deprived of the due process of law and equal protection of the laws.

For all of the foregoing reasons, including the arguments respecting the second and third questions presented for review, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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808 Maclellan Building
Chattanooga, Tennessee 37402
Telephone: 615/756-5111

Attorney for Petitioners

APPENDIX A

[fol. 1]

IN THE CIRCUIT COURT FOR HAMILTON COUNTY, TENNESSEE

State of Tennessee, ex rel Otis O'Dell, et al vs. City of Chattanooga, et al	No. N-16198
State of Tennessee, ex rel Robert J. Hicks, et al vs. City of Chattanooga, et al	No. N-16199
State of Tennessee, ex rel James W. Hartley, et al vs. City of Chattanooga, et al	No. N-16202
State of Tennessee, ex rel Nell Johns, et al vs. City of Chattanooga, et al	No. N-16209

MEMORANDUM

(Filed July 6, 1973)

The above four quo warranto cases contesting the validity of ordinances purporting to annex certain areas to the

City of Chattanooga were consolidated and heard at the same time. The undersigned was designated by the Chief Justice of the Supreme Court of Tennessee, to hear the cases. Oral proof was heard from March 19, 1973, through March 28, 1973, and, by agreement, the proposed areas were toured by the Court and counsel on March 29, 1973. The matter was then taken under advisement pending receipt of briefs and written arguments.

The complaint in each case is filed under Tennessee Code Annotated, Section 6-310, which sets out the procedure to follow in contesting annexation by a municipal authority. The pleadings in these cases and the general order of proof were as follows:

[fol. 2] TIFTONIA

State of Tennessee, ex rel Otis O'Dell, Number N-16198, contested the validity of ordinance number 6397, adopted by the City of Chattanooga, this ordinance purporting to annex an area to the west of the present city boundaries, commonly known as Tiftonia, and identified on Exhibit 1, a map of the Study Area Boundaries, as area number 4; and ordinance number 6398, purporting to provide for a plan of taxation for area 4, annexed by ordinance number 6397. Plaintiffs also contend that Resolution number 9168, purporting to adopt a plan of services for this area is invalid.

WAUHATCHIE

In the case of State of Tennessee, ex rel Robert J. Hicks vs. City of Chattanooga, et al, number N-16199, the complaint proposes to contest the validity of ordinance number 6393, which purports to annex to the City of Chattanooga an area lying west of the City and north, west and

south of Tiftonia, referred to as Wauhatchie and identified on the Study Area Boundaries (Exhibit 1) as area 12; and ordinance number 6394 purporting to provide a plan of taxation for area 12 as annexed by ordinance number 6393. Plaintiffs also contend that Resolution No. 9166, purporting to adopt a plan of services for this area is invalid.

NORTH MOUNTAIN CREEK

The case of State of Tennessee, ex rel James W. Hartley vs. City of Chattanooga, et al, number N-16202, complained that ordinance number 6395 purporting to annex certain areas located northwardly from the present City of Chattanooga and ordinance number 6396 providing for taxation of the area shown on the Study Area Boundaries (Exhibit 1) as 13A, and resolution number 9167 providing for the services to be furnished the area known as 13A are invalid and amount to an arbitrary and oppressive abuse of power delegated to the City of Chattanooga by the Tennessee Legislature.

[fol. 3] EAST BRAINERD

The case of State of Tennessee, ex rel Nell Johns, et al vs. City of Chattanooga, et al, number N-16209, complains that ordinance number 6389 purporting to annex a certain area eastwardly from the City of Chattanooga, known as East Brainerd and referred to on the Study Area Boundaries Map (Exhibit 1) as 9B, is invalid, along with ordinance number 6390 providing for taxation, and resolution number 9164 providing for a plan of services for the area.

In each of the above cases it was complained that various specified sections of the state constitution and the federal constitution had been violated in the manner in

which the city purported to carry out the annexations involved. Annexation of territory by a municipal corporation is a legislative function; a municipality can only extend its boundaries and annex territory in strict accordance with the state statutes that provide for it. The Court holds that the plaintiffs have failed to show any constitutional infirmities in the procedures followed by the defendant City.

Municipal corporations in Tennessee are allowed to change their boundaries provided they comply with Tennessee Code Annotated, Sections 6-303 through 6-321. In TCA, Section 6-309 it is provided that a municipality upon its own initiative "when it appears that the prosperity of such municipality and territory will be materially retarded and the safety and welfare of the inhabitants and property thereof endangered, after notice and public hearing, by ordinance, may extend its corporate limits by annexation of such territory adjoining its existing boundaries as may be deemed necessary for the welfare of the residents and property owners of the affected territory as well as the municipality as a whole..." This statute also provides that the municipality must first adopt a plan of services

[fol. 4] setting forth at a minimum the identification and projected timing of municipal services proposed to be extended into the territory proposed to be annexed. It is also required that before any such plan of services shall be adopted it must have been submitted to the local Planning Commission, if available, for study and a written report rendered within a specified time.

Under TCA, Section 6-310 the method of contesting any such proposed annexation is outlined and it is provided that any aggrieved owner of property lying within the pro-

posed annexation may file a quo warranto proceeding to contest the validity thereof on the ground that it reasonably may not be deemed necessary for the welfare of the residents and property owners of the affected territory and municipality as a whole and so constitutes an exercise of power not conferred by law. It is further provided that the issue shall be whether the proposed annexation be or be not unreasonable in consideration of the health, safety and welfare of the citizens and property owners of the territory sought to be annexed and the citizens and property owners of the municipality. If the Court before whom the matter is heard finds the ordinance to be unreasonable it may be vacated and in the absence of such finding an order shall be issued sustaining the validity of such ordinance.

Historically, municipalities have found it necessary to expand their city boundaries, and that is why the Legislature has adopted statutes setting out the procedure to be followed.

The growth pattern of the City of Chattanooga, as in many other cities in the past few decades, reflects a move by many people to the suburbs. Thus, proof shows that Hamilton County in 1950, had a population of 208,255 and in 1970, the population was 255,007. The City of Chattanooga had a population in 1950, of 131,041 and yet in 1970, its population had decreased to 119,923. Certain segments of the population, referred to as the middle class, move out of the city and the city loses their support and their participation in the tax structure.

[fol. 5] Therefore, without going into great detail, it clearly appears that the City of Chattanooga has found it necessary to expand its boundaries. The determination of this question, as provided by the State Legis-

lature, is a legislative function of the city. The question before the Court is as to its reasonableness.

In general, as to the four areas to be annexed, it was shown by the plaintiffs that the county was able to provide health services, a planning commission, police protection through its Sheriff's Department, pollution control, a land-fill operation, county roads and county schools, that water and electricity were available, that septic tanks were reasonably efficient, that private garbage collection and fire protection were available, that some recreational facilities were available, and that the health safety and welfare of the citizens of these areas was not endangered and that the prosperity of the residents of the affected areas and the municipality would not be materially retarded if the annexation were not permitted. The plaintiffs' proof was that the city had failed adequately to provide the services mentioned within the present city and that it would not be financially able to provide the services to the annexed areas; that, consequently it would be unfair to raise their taxes for services not received. It was, therefore their position that annexation of these four areas was unreasonable under all the circumstances.

On the other hand, it was shown by the city that the areas in question had no fire protection comparable to what the city could offer (and ultimately a lowering of insurance rates), that the city could provide better police protection, and that the schools would have available more funds, with a smaller teacher-pupil ratio, that the health of these areas was endangered due to percolation problems with regard to septic tanks and that the county had never provided sanitary sewers, whereas the city could, that the county does not provide refuse and garbage collection, nor recreational facilities, nor street lighting,

[fol. 6] nor traffic engineering, nor certain inspection services, which services could and would be provided by the city. Further, that the vast majority of the people in the proposed areas work in the city, that their economic opportunities were provided by the city, that recreational facilities were provided and could be better provided by the city, that the airport was provided by the city, that cultural advantages were provided by the city and utilized by county residents and that it was necessary and right that the tax burden for all such services be equitably distributed. It was shown that the city was financially able to and would provide the usual municipal services in accordance with the schedule of services, or before the dates scheduled.

The city especially contends that it was necessary and proper for the annexed areas to become a part of the city in order to insure the future orderly and planned growth of the city.

The city's position was that the proposed annexations were a reasonable exercise of the legislative authority delegated to the municipality by the Legislature.

It appears to the Court that TCA, Section 6-309 provides a guideline to the legislative body of the municipality by providing that it determine that the prosperity of the municipality and proposed annexed area will be materially retarded and the safety and welfare of the inhabitants and property thereof endangered unless annexation takes place and if the procedure therein outlined is followed then under Section 6-310, if the annexation is contested, it becomes a judicial function to determine whether the annexation is reasonably necessary for the welfare of the residents and property owners of the affected territory and the municipality as a whole, giving consideration to the health, safety

and welfare of the citizens and property owners of both the territory sought to be annexed and the citizens and property owners of the municipality. The burden of proof would be upon the plaintiffs to show by a preponderance of the proof that the proposed annexation was unreasonable.

[fol. 7] Except as mentioned below, it appears to the Court, after hearing all of the proof, reviewing the exhibits and after considering the entire matter, that the plaintiffs have failed to show that the proposed annexation of North Mountain Creek (area 13A) and East Brainerd (area 9B) is an unreasonable and arbitrary exercise of the legislative authority delegated to the municipality by the Legislature of the State of Tennessee. It is the opinion of the Court that it is not unreasonable for the City of Chattanooga to annex the North Mountain Creek area and the East Brainerd area in view of the proof of the ability of the city to provide the usual municipal services and especially in view of the overwhelming proof that the city's natural growth is to the north and the east. It is only right and proper that these areas be annexed in order to provide for the orderly future growth of the City of Chattanooga. It is, however, the opinion of the Court that it would be an unreasonable exercise of the legislative function delegated to the City of Chattanooga by the Legislature of the State of Tennessee to allow the annexation of Tiftonia and Wauhatchie in view of the proof mentioned above, that is, that the natural growth of the city is to the north and east. Tiftonia and Wauhatchie are separated from the City of Chattanooga by the Tennessee River and by Lookout Mountain and are natural communities within themselves and are somewhat "isolated" from the city. There was virtually no proof of any relationship between the natural growth of the City of Chattanooga and the land

area to the west of the city, and, consequently, no proof that it would be necessary to plan the development of these areas for the future orderly development of the city. There was proof that the construction of I-24 had made these areas more easily accessible to the city of Chattanooga but there was also proof that one of the principal arteries for transportation from this area was along the Cummings Highway which passes through a county area before getting into the areas known as Tiftonia and Wauhatchie. The welfare of the residents and property owners of Tiftonia and Wauhatchie, as well as the City of Chattanooga, would not, in the Court's opinion, be adversely affected if the annexation of the two areas was not consummated. In view of the above findings and after giving due consideration to the topography and [fol. 8] geographic features of the two areas as related to the City, the annexation of Tiftonia and Wauhatchie cannot reasonably be justified at this time, and it is the Court's opinion that annexation would be unreasonable under the circumstances. The mere fact that a city can provide certain municipal services and could use more residential and industrial lands would not justify annexation.

In view of this decision an order should be prepared vacating city ordinances number 6397, 6398, and resolution 9168, which concern the annexation of Tiftonia, and also vacating the resolutions with regard to Wauhatchie, being number 6393, 6394 and resolution number 9166. The order should also reflect that the Court sustains the validity of the ordinances with regard to North Mountain Creek, that is number 6395 and 6396 and resolution number 9167, and with regard to East Brainerd, that is ordinance number 6389 and 6390 and resolution number 9164.

An order will be prepared by counsel for the City of Chattanooga reflecting the decision of the Court with regard to these four consolidated cases, preserving therein the right to an appeal by the adversely affected parties.

This 3rd day of July, 1973.

/s/ Sam E. Boaz
Judge by Designation

APPENDIX B

[fol. 1] IN THE CIRCUIT COURT
OF
HAMILTON COUNTY, TENNESSEE

State of Tennessee, ex rel Otis O'Dell, et al vs. City of Chattanooga, et al	No. N-16198
State of Tennessee, ex rel Robert J. Hicks, et al vs. City of Chattanooga, et al	No. N-16199
State of Tennessee, ex rel James W. Hartley, et al vs. City of Chattanooga, et al	No. N-16202
State of Tennessee, ex rel Nell Johns, et al vs. City of Chattanooga, et al	No. N-16209

AMENDMENT TO MEMORANDUM

(Filed July 23, 1973)

The memorandum heretofore filed in these consolidated causes on July 6, 1973, is hereby amended by striking the

second sentence in the first paragraph of page 7 and substituting in lieu thereof the following:

It is the opinion of the Court that it is not unreasonable for the City of Chattanooga to annex the North Mountain Creek area and the East Brainerd area in consideration of the health, safety and welfare of the citizens and property owners, both of the city and of the territories being annexed, and in view of the proof of the ability of the city to provide the usual municipal services, and especially in view of the overwhelming proof that the city's natural growth is to the north and east.

This July 21, 1973.

/s/ Sam E. Boaz
Judge by designation

APPENDIX C

[fol. 1]

IN THE CIRCUIT COURT
OF HAMILTON COUNTY, TENNESSEE

STATE OF TENNESSEE, ex rel, OTIS O'DELL, et al vs. CITY OF CHATTANOOGA, et al	No. N-16198
STATE OF TENNESSEE, ex rel, ROBERT J. HICKS, et al vs. CITY OF CHATTANOOGA, et al	No. N-16199
STATE OF TENNESSEE, ex rel, JAMES W. HARTLEY, et al vs. CITY OF CHATTANOOGA, et al	No. N-16202
STATE OF TENNESSEE, ex rel, NELL JOHNS, et al vs. CITY OF CHATTANOOGA, et al	No. N-16209

FINAL DECREE
(INCORPORATES AMENDMENT TO MEMORANDUM)

These causes came on to be heard from March 19, 1973, through March 29, 1973, before the Honorable Sam Boaz, Judge of Law and Equity, sitting specially, having been

designated by the Chief Justice of the Supreme Court of Tennessee to hear these cases. Said causes, having been consolidated for trial purposes, came on to be heard upon the original complaints, the answers of defendants, testimony of witnesses in open court, a tour of the areas to be annexed by the court and counsel, and the entire record as a whole, from all of which the Court is of the opinion, for the reasons stated in its Memorandum Opinion, filed July 6, 1973, and its Amendment to Memorandum filed July 23, 1973, which are hereby ordered
[fol. 2] incorporated herein and made a part hereof by reference, and which are directed to be made a part of the record of these causes, that the annexation of the areas known as 13-A, being the North Mountain Creek area, and 9-B, being the East Brainerd area, by the City of Chattanooga, is not unreasonable in consideration of the health, safety and welfare of the citizens and property owners, both of the city and of the territories being annexed, and in view of the proof of the ability of the City to provide the usual municipal services, and especially in view of the overwhelming proof that the city's natural growth is to the north and east, and the validity of the ordinances annexing said areas should be sustained. Further, for the reasons set forth in the Memorandum Opinion filed July 6, 1973, the Court is of the opinion that the ordinances annexing the areas known as Area 4, Tiftonia, and Area 12, Wauhatchie-Williams Island, are unreasonable and should be vacated.

It is therefore, ORDERED, ADJUDGED and DECREED by the Court:

1. That Ordinances No. 6389 and 6395 of the City of Chattanooga, Tennessee, annexing the areas referred to as East Brainerd and North Mountain Creek, along with

Ordinances No. 6390 and 6396, providing for taxation thereof, and Resolutions No. 9164 and 9167, providing for Plans of Services, be and hereby are declared valid and the same are hereby in all respects sustained.

2. That, as provided by Tennessee Code Annotated Section 6-310, said ordinances shall become operative thirty-one (31) days after the entry of this Decree.

3. That Ordinances No. 6393 and 6397 of the City of Chattanooga, Tennessee, be and are hereby de-
[fol. 3] clared unreasonable, and the same shall be vacated, along with Ordinances No. 6394 and 6398, providing for taxation, and Resolutions No. 9166 and 9168, providing Plans of Services.

4. That the costs of Cases No. 16198 and 16199 are adjudged against the defendant City of Chattanooga, and the costs of Cases No. 16202 and 16209 are adjudged against the respective Relators and the sureties on their costs bonds, and for the collection of which execution may issue.

To the actions of the Court in Cases No. 16202 and 16209, in sustaining the validity of the ordinances and resolutions annexing the East Brainerd and North Mountain Creek areas, and to the adverse facts of this Final Decree, the respective Relators excepted, and now except, and pray for an appeal to the next term of the Supreme Court sitting at Knoxville, which appeal is hereby granted upon their perfecting an appeal as required by law.

To the actions of the Court in Cases No. 16198 and 16199, in declaring the ordinances and resolutions annexing Tiftonia and Wauhatchie-Williams Island unreasonable and vacating the same, and to the adverse facts of this Final Decree, the defendant, City of Chattanooga, et al,

excepted, and now except, and pray for an appeal to the next term of the Supreme Court, sitting at Knoxville, which appeal is hereby granted upon their perfecting an appeal as required by law.

This the ____ day of _____, 1973.

_____
JUDGE

APPROVED FOR ENTRY:

_____
Counsel for Otis O'Dell, et al

_____
Counsel for Robert J. Hicks, et al

[fol. 4]

_____
Counsel for James W. Hartley, et al

_____
Counsel for Nell Johns, et al

_____
Counsel for City of Chattanooga, et al

APPENDIX D

[fol. 1]

CITY OF CHATTANOOGA,
TENNESSEE, ET AL,
Appellant

VS.

STATE OF TENNESSEE, EX REL,
ROBERT J. HICKS, ET AL,
Appellee

CITY OF CHATTANOOGA,
TENNESSEE, ET AL,
Appellant

VS.

STATE OF TENNESSEE, EX REL,
OTIS O'DELL, ET AL,
Appellee

HAMILTON COUNTY LAW,
Honorable Sam E. Boaz,
Judge

For the Appellant:

Eugene N. Collins,
Chattanooga, Tennessee.

Randall L. Nelson,
Chattanooga, Tennessee.

For Appellee:

Thomas H. O'Neal,
Chattanooga, Tennessee.

OPINION

(Filed July 29, 1974)

In 1971, the City of Chattanooga initiated by ordinances the annexation of several adjacent areas of the City, and upon final passage of the ordinances, actions were brought in the Courts of Hamilton County "in the nature of quo

warranto" by residents of the various areas. Four of said suits were brought in the Circuit Court of Hamilton County, and in the various suits they are referred by areas as follows: Case Number N-1619, "Tiftonia"; Case Number N-16199, "Wauhatchie"; Case Number N-16202, "North Mountain Creek"; and Case Number N-16209 as "East Brainerd". For the purpose of a hearing these four cases were consolidated, and were heard by Honorable Sam E. Boaz, as Special Judge by designation of the Chief Justice of the Tennessee Supreme Court. Oral proof on the questions raised was heard from March 19, 1973 through March 28, 1973. In a memorandum opinion, the Court vacated the ordinances annexing the areas known as "Tiftonia" and "Wauhatchie", and the City appealed. The trial judge sustained the ordinance annexing the areas of "North Mountain Creek" and "East Brainerd" and the plaintiffs have appealed. In this opinion only the action of the trial judge in vacating the ordinances applying to "Tiftonia" and "Wauhatchie" is involved, and the City has filed in each case identical assignments of error as follows:

[fol. 2]

"I. The lower court erred as a matter of law in holding that the plaintiffs (relators) had only to show by a preponderance of the proof that the proposed annexation was unreasonable.

"II. The lower court erred in substituting its opinion of reasonableness for that of the Board of Commissioners, the legislative body of the City of Chattanooga.

"III. The lower court erred by failing to sustain the annexation ordinance, the appellants having introduced enough evidence to preponderate against the judgment below and to make, at the very least, a reasonably debatable question as to the reasonableness of the annexation."

Appendix D

The trial judge in his memorandum summarized the testimony as follows:

"In general, as to the four areas to be annexed, it was shown by the plaintiffs that the county was able to provide health services, a planning commission, police protection through its Sheriff's Department, pollution control, a landfill operation, county roads and county schools, that water and electricity were available, that septic tanks were reasonably efficient, that private garbage collection and fire protection were available, that some recreational facilities were available, and that the health, safety and welfare of the citizens of these areas was not endangered and that the prosperity of the residents of the affected areas and the
[fol. 3] municipality would not be materially retarded if the annexation were not permitted. The plaintiff's proof was that the city had failed adequately to provide the services mentioned within the present city and that it would not be financially able to provide the services to the annexed areas; that, consequently it would be unfair to raise their taxes for services not received. It was, therefore their position that annexation of these four areas was unreasonable under all the circumstances.

"On the other hand, it was shown by the city that the areas in question had no fire protection comparable to what the city could offer (and ultimately a lowering of insurance rates), that the city could provide better police protection, and that the schools would have available more funds, with a smaller teacher-pupil ratio, that the health of these areas was endangered due to percolation problems with regard to septic tanks and that the county had never provided sanitary sewers, whereas the city could, that the county does not provide

refuse and garbage collection, not recreational facilities, nor street lighting, nor traffic engineering, nor certain inspection services, which services could and would be provided by the city. Further, that the vast majority of the people in the proposed areas work in the city, that their economic opportunities were provided by the city, that recreational facilities were provided and could be better provided by the city, that the airport was provided by the city, that cultural advantages were provided by the city and utilized by county residents and that it was necessary and right that the tax burden for all such services be equitably distributed. It was shown that the city was financially able to and would provide the usual municipal services in accordance with the schedule of services, or before the dates scheduled."

Here we should observe in this opinion that we will consider only the action of the trial judge holding these ordinances invalid because "[T]he welfare of the residents and property owners of Tiftonia and Wauhatchie, as well as the City of Chattanooga, *would not, in the Court's opinion*,

[fol. 4] be adversely affected if the annexation of the two areas was not consummated". (Emphasis added.)

Immediately preceding the summary of the evidence, the trial judge made the following observation:

"Historically, municipalities have found it necessary to expand their city boundaries, and that is why the Legislature has adopted statutes setting out the procedure to be followed.

"The growth pattern of the City of Chattanooga, as in many other cities in the past few decades, reflects a move by many people to the suburbs. Thus, proof

shows that Hamilton County in 1950, had a population of 208,255 and in 1970, the population was 255,007. The City of Chattanooga had a population in 1950 of 131,041 and yet in 1970, its population had decreased to 119,923. Certain segments of the population, referred to as the middle class, move out of the city and the city loses their support and their participation in the tax structure. Therefore, without going into great detail, it clearly appears that the City of Chattanooga has found it necessary to expand its boundaries. *The determination of this question, as provided by the State Legislature, is a legislative function of the city. The question before the Court is as to its reasonableness.*" (Emphasis added.)

In all of these annexation cases now before this Court, including a companion case appealed from the Chancery Court of Hamilton County, the procedure followed by the City prior to passage of the final ordinances was the same. In each case the plans of services were based upon a comprehensive study of all areas surrounding and adjacent to the City of Chattanooga. In the companion case from the Chancery Court of Hamilton County, styled *State of Tennessee, Ex Rel, Lucius P. Hodson, et al*, we have today released an opinion wherein the procedure followed by the City prior to the final passage of the ordinances was discussed and held to be in compliance with the statutory provisions. All constitutional questions which could be raised were presented in that case and found to be without merit. Thus in these cases, we have before
[fol. 5] us only one question which will dispose of all of the assignments of error. Did the trial judge apply the proper rule of law in passing upon the facts as he found them to be from all of the evidence?

In *Morton v. Johnson City*, 206 Tenn. 411, 333 S.W.2d 924, (1960), this Court cited with approval the language of the Supreme Court of Missouri in the case of *City of St. Joseph v. Hankinson*, 312 S.W. 2d 4, as follows:

> "* * * the court does not, in any sense, substitute its discretion or judgment as to the advisability or propriety of the annexation for that of the legislative body of the city, and that it does not review the legislative discretion; *its consideration of 'reasonableness' is confined to a determination of whether there exists a sufficient showing of reasonableness to make that question, at the least, a fairly debatable one*; if there is such, then the discretion of the legislative body is conclusive. Citing authorities." (Emphasis added.)

Since *Morton*, that rule has been uniformly and consistently followed by the Courts of Tennessee. In the recent case of *State Ex Rel, Wood, et al v. City of Memphis*, (Released for publication on June 3, 1974), ___ S.W.2d ___ (Tenn. 1974), we quoted from *State Ex Rel v. City of Columbia*, 208 Tenn. 59, 343 S.W.2d 888 (1961), as follows:

> "In the outset it might not be amiss to say that annexation by city ordinance under this statute contains no trick or gimmick. It is just the Legislature conferring the right upon the city fathers to annex under the conditions prescribed in the statute. This right of annexation, aside from the statute, would be in the Legislature, and the Legislature having the right to annex has likewise the right to confer this power upon the city fathers, and it seems to us perfectly obvious that the city fathers would know far more about the needs and necessity of annexation than would the Legis-

[fol. 6] lature. The reasons therefor are so obvious that it isn't necessary for us to express them. This being true, such an annexation, so long as it complies with the statute, has the same force and effect and is subject to the same attacks only as annexation would be if done by the Legislature."

In the *Memphis* case we also said:

"It is obvious that in the annexation of territory, someone must fix the boundaries, and whether said boundaries are fixed pursuant to the annexation statute contained in T.C.A. § 6-309 or directly by the legislature, *it remains a legislative matter and will not be disturbed by this Court unless the action was arbitrary and unreasonable.* On the question of reasonableness, we realize that in every annexation case there are both advantages and disadvantages to annexation. Nevertheless, if a debatable question exists as to whether the advantages outweigh the disadvantages, then the court must rule in favor of the annexation. Stated another way, if the reasonableness of the annexation is a debatable question, then the court will uphold the validity of the annexation." (Emphasis added.)

The appellees, plaintiffs below, cite the case of *State Ex Rel, Cope, et al v. Mayor and Board of Aldermen of the Town of Morristown*, 218 Tenn. 593, 404 S.W.2d 798 (1966), and state on page seven (7) of their brief that, "the Tennessee Supreme Court affirmed the judgment of the Chancellor who found an annexation ordinance by the Town of Morristown was not reasonable, but was an arbitrary and oppressive exercise of delegated legislative power." This is an erroneous statement. That case was an appeal from the Circuit Court of Hamblen County, upholding the annexation ordinance. A jury was empaneled in that case

and at the conclusion of all of the evidence, both for and against the annexation, the judge withdrew the issues from the jury. In sustaining the lower court, this Court speaking through Mr. Justice Creason, said: "From this record it is obvious that the trial judge concluded, [fol. 7] on the evidence, that a fairly debatable question was posed as to the reasonableness of the ordinance. Equally obvious is the fact that Judge Todd was applying the rationale of the opinion of this Court in *Morton v. Johnson City*, 206 Tenn. 411, 333 S.W.2d 924 (1960). In our view the trial court properly applied the rule announced in that opinion."

The summary of the evidence as hereinafore copied from the trial judge's memorandum, shows that the question before the legislative body, exercising the power delegated to it by statute, raised a fairly debatable question. In other words, the City's legislative body did not act arbitrarily and in excess of its legislative powers by annexing the territories herein involved. Moreover, where the preponderance of the evidence lies is not the test in annexation cases, but rather the test is whether a fairly debatable question as to the reasonableness of the annexation exists. In view of our holding herein, it necessarily follows that the Chancellor's decree is reversed as to the areas of "Tiftonia" and "Wauhatchie" and these cases are remanded back to the trial court for disposition consistent with this opinion.

/s/ W. M. Leech
W. M. LEECH, SPECIAL JUSTICE.

CONCURRING:
DYER, C.J.,
CHATTIN, J.,
McCANLESS, J.,
FONES, J.

APPENDIX E

[fol. 1]

CITY OF CHATTANOOGA,
TENNESSEE, ET AL,
Respondent

VS.

STATE OF TENNESSEE, EX REL,
ROBERT J. HICKS, ET AL,
Petitioner

CITY OF CHATTANOOGA,
TENNESSEE, ET AL,
Respondent

VS.

STATE OF TENNESSEE, EX REL,
OTIS O'DELL, ET AL,
Petitioner

HAMILTON COUNTY LAW,
Honorable Sam E. Boaz,
Judge

For Petitioner:

Eugene N. Collins,
Chattanooga, Tennessee.

Randall L. Nelson,
Chattanooga, Tennessee.

For Respondent:

Thomas H. O'Neal,
Chattanooga, Tennessee.

OPINION ON PETITION TO REHEAR

(Filed August 30, 1974)

In this cause petitioners have filed an earnest petition to rehear and cite and rely upon the case of *State Ex Rel, Spoone v. Mayor and Board of Aldermen of the Town of*

Morristown, 222 Tenn. 21, 431 S.W.2d 827 (1968). In our original opinion we were fully aware of the holding in the *Spoone* case and since that case only reasserted the "fairly debatable" rule pronounced in *Morton v. Johnson City*, 206 Tenn. 411, 333 S.W.2d 924 (1960), we deemed it unnecessary to discuss that case.

In the *Spoone* case, the lower court found "that the ordinance was so palpably unreasonable and unnecessary as to be an *arbitrary and oppressive exercise of dele-*
[fol. 2] *gated legislative power.*" (Emphasis added.) In affirming the lower court in that finding, it was pointed out that the advantages testified to by the Town's witnesses were not directed to the specific area sought to be annexed, which was not a densely populated area.

In the case subjudice conflicting evidence as to the necessity of annexation was to the specific area and was of such a nature and volume as to raise a fairly debatable question. The trial judge's finding of fact also shows this to be the case. The trial judge did not find that the legislative action of the City "was palpably unreasonable and unnecessary as to be an arbitrary and oppressive exercise of delegated legislative power."

We held in our original opinion that the trial judge did not apply to the evidence the legal test prescribed by *Morton*, and after a careful review of the record and the authorities cited, we reaffirm that holding.

All other questions presented in the petition to rehear were fully covered in our original opinion and since several cases were involved the record was carefully read on the original hearing and we have reviewed our original notes and authorities and again hold that the trial judge

did not apply the proper rule of law in passing upon the facts as he found them. The evidence introduced as to these two areas presented a fairly debatable question and was therefore a legislative matter.

The petition to rehear is denied.

/s/ W. M. Leech
W. M. LEECH, SPECIAL JUSTICE.

CONCURRING:
DYER, C.J.,
CHATTIN, J.,
McCANLESS, J.,
FONES, J.

APPENDIX F

[fol. 1]

IN THE SUPREME COURT OF TENNESSEE AT KNOXVILLE

STATE OF TENNESSEE, EX REL
OTIS O'DELL, ET AL
Appellee

V.

CITY OF CHATTANOOGA,
TENNESSEE, ET AL
Appellant

NO. 89
HAMILTON COUNTY LAW

STATE OF TENNESSEE, EX REL
ROBERT J. HICKS, ET AL
Appellee

V.

CITY OF CHATTANOOGA,
TENNESSEE, ET AL
Appellant

NO. 90
HAMILTON COUNTY LAW

ORDER

(Filed September 23, 1974)

A motion for leave to file a second petition to rehear has been filed by the plaintiffs in the above cause. The application for special leave cites no new grounds that have not been determined, either in this case or the companion cases from the Circuit and Chancery Courts of Hamilton County. The questions as to the constitutionality of the statute are similar to those which were raised in the

Chancery Court case of State, ex rel Hodson, which was decided adversely to the contention of the plaintiffs in an opinion by Mr. Justice Chattin on July 29, 1974, and also contains the same question that was decided in the case of State ex rel Wood v. City of Memphis, an opinion which was released on June 3, 1974. All questions as to the constitutionality of the statute and of the applicable rule in passing upon the evidence were considered in the original opinion and the petition to rehear, and since no new authorities or statement of authorities overlooked in these cases have been presented to the Court in the motion. The application for permission to file a second petition to rehear is denied. The motion also was not filed prior to the adjournment of Court and comes too late.

/s/ W. M. Leech
W. M. LEECH, Special Justice

APPENDIX G

TENNESSEE CODE ANNOTATED

* * *

6-309. Annexation by ordinance. -- A municipality when petitioned by a majority of the residents and property owners of the affected territory, or upon its own initiative when it appears that the prosperity of such municipality and territory will be materially retarded and the safety and welfare of the inhabitants and property thereof endangered, after notice and public hearing, by

ordinance, may extend its corporate limits by annexation of such territory adjoining its existing boundaries as may be deemed necessary for the welfare of the residents and property owners of the affected territory as well as the municipality as a whole, provided said ordinance shall not become operative until thirty (30) days after final passage thereof.

Provided, however, that before any territory more than one-fourth (1/4) square mile in area or having a population of more than five hundred (500) persons may be annexed under this section, the governing body of the municipality shall adopt a plan of service setting forth at a minimum the identification and projected timing of municipal services proposed to be extended into the territory proposed to be annexed. Provided, further, that before any such plan of service shall be adopted, it must have been submitted to the local planning commission, if there be such, for study and a written report, to be rendered within ninety (90) days after such submission, unless by resolution of the governing body a longer period is allowed.

Anything contained in chapter 3 of title 6 to the contrary notwithstanding, a municipality in any county having a population of over sixty-six thousand (66,000) (except in those counties having a population of more than seven hundred thousand (700,000) according to the United States census of population of 1970 or any subsequent federal census; or in those counties which have the metropolitan form of government) shall have the supplemental right and authority to annex upon its own initiative by ordinance any territory without levying any municipal ad valorem taxes except for actual municipal services rendered, and that the residents of, and persons owning property in, annexed territory shall be entitled to rights and privileges of citizenship, in ac-

cordance with the provisions of the annexing municipality's charter, immediately upon annexation as though such annexed territory had always been a part of the annexing municipality; and it shall be the duty of the governing body to put into effect with respect to an annexed area any charter provisions relating to representation on the governing body. Any municipality that exercises such right to annex is hereby authorized, required and shall levy separate ad valorem taxes for each municipal purpose and/or service within the existing limits of the city and shall levy only such taxes, if any, in any territory annexed hereunder when and if the municipal service or purpose for which such taxes have been imposed is actually being rendered; provided however, that in the case of sanitary sewers, such sewers shall be furnished within thirty-six (36) months after ad valorem taxes become due.

In the counties having a population of more than seven hundred thousand (700,000), or having a population of not less than two hundred and sixty thousand (260,000) nor more than two hundred and eighty thousand (280,000) according to the United States census of population of 1970 or any subsequent federal census, or in those counties which have the metropolitan form of government, a smaller municipality may, by ordinance, extend its corporate limits by annexation of any contiguous territory, when such territory within the corporate limits of a larger municipality is less than seventy-five (75) acres in area, is not populated, is separated from the larger municipality by a limited access express highway, its access ramps or service roads, and is not the site of industrial plant development. The provisions of this chapter relative to the adoption of a plan of service and the submission of same to a local planning commission, if there be such, shall not be required of the smaller municipality for such

annexation. [Acts 1955, ch. 113, §2; 1961, ch. 320; §1; 1969, ch. 136, §1; 1971, ch. 420, §§1, 2, 3; 1972 (Adj.S.), ch. 844, §1; 1974 (Adj.S.), ch. 753, §§1, 2, 8, 9]

* * *

APPENDIX H

TENNESSEE CODE ANNOTATED

* * *

6-310. Quo warranto to contest annexation ordinance--Appeal. -- Any aggrieved owner of property lying within territory which is the subject of an annexation ordinance prior to the operative date thereof, may file a suit in the nature of a quo warranto proceeding in accordance with §§ 6-308--6-320 and chapter 28 of title 23, to contest the validity thereof on the ground that it reasonably may not be deemed necessary for the welfare of the residents and property owners of the affected territory and the municipality as a whole and so constitutes an exercise of power not conferred by law.

If more than one (1) suit is filed, all of them shall be consolidated and tried as one (1) in the first court of appropriate jurisdiction in which suit is filed. Suit or suits, shall be tried on an issue to be made up there, and the question shall be whether the proposed annexation be or be not unreasonable in consideration of the health, safety and welfare of the citizens and property owners of the territory sought to be annexed and the citizens and prop-

erty owners of the municipality. Should the court find the ordinance to be unreasonable, an order shall be issued vacating the same. In the absence of such finding an order shall be issued sustaining the validity of such ordinance, which shall then become operative thirty-one (31) days after judgment is entered unless an abrogating appeal has been taken therefrom.

If on appeal judgment shall be against the validity of such ordinance, an order shall be entered vacating the same; otherwise, it shall become operative forthwith by court order and shall not be subject to contest or attack in legal or equitable proceeding for any cause or reason, the judgment of the appellate court being final.

Should the territory hereafter sought to be annexed be the site of substantial industrial plant development, a fact to be ascertained by the court, the municipality shall have the burden or proving that the annexation of the site of the industrial plant development is not unreasonable in consideration of the factors above mentioned, including the necessity for, or use of municipal services by the industrial plant or plants, and the present ability and intent of the municipality to benefit the said industrial plant development by rendering municipal services thereto when and as needed. The policy and purpose of this provision is to prevent annexation of industrial plants for the sole purpose of increasing municipal revenue, without the ability and intent to benefit the area annexed by rendering municipal services, when and as needed, and when such services are not used or required by the industrial plants.

During the time that any annexation ordinance is being contested as provided herein, the annexing municipality and the county governing body (and/or any affected school, sanitary or utility district) may enter into an agreement

to provide for new, expanded, and/or upgraded services and facilities (including, but not limited to, equipment, land, and buildings), and capital expenditures (including sale of bonds) to finance such services and facilities, which agreement shall include an equitable division of the cost and liabilities of such capital expenditures between the annexing municipality and the county governing body (and/or affected school, sanitary, or utility district) upon final determination of such contested annexation ordinance. [Acts 1955, ch. 113, §2; 1961, ch. 220, §1; 1970 (Adj.S.), ch. 516, §1; 1974 (Adj.S.), ch. 753, §§4, 8, 9.]

* * *